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In the Supreme Court of the United States

OCTOBER TERM, 1994

BRETT C. KIMBERLIN, PETITIONER

v.

J. MICHAEL QUINLAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

1. Whether, in a *Bivens* case in which unlawful motive is an element of a constitutional claim, a plaintiff must meet a "heightened pleading" standard to survive a motion to dismiss or for summary judgment raising a qualified-immunity defense.

2. Whether a plaintiff in a *Bivens* case in which unlawful motive is an element of a constitutional claim must produce, prior to discovery, "direct" as opposed to circumstantial evidence of unlawful motive in order to avoid dismissal or summary judgment.

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This brief is submitted in response to the Court's order inviting the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

1. The United States has important interests in the law relating to qualified immunity, including the pleading and evidentiary standards challenged in the petition in this case. Qualified immunity may apply in civil actions against federal personnel in their personal capacities under *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), as well as in civil actions against state and local officials under 42 U.S.C. 1983. The United States has an interest in protecting government employees from meritless and

unduly burdensome litigation that can interfere with their exercise of lawful discretion in their official functions and deter qualified individuals from public service. The United States also has an interest in ensuring effective deterrence of unconstitutional conduct by government employees, and in ensuring that adequate remedies exist for violations of constitutional rights.

This case is one of approximately 500 *Bivens* cases filed each year against personnel of the United States Bureau of Prisons (Bureau or BOP).[1] The Bureau consists of 79 prisons, six regional offices, and the Central Office in Washington, D.C. The majority of Bureau personnel are line staff, such as Correctional Officers, Correctional Counselors, Case Managers, and Unit Managers. The responsibilities of line staff require close daily contact with the inmate population and call upon the staff to exercise discretion in preserving inmate discipline and providing for the needs of inmates and the safety and security of inmates and staff. The Bureau trains and encourages its line staff to interact frequently with inmates in order to anticipate and resolve conflicts without unnecessary confrontations. Programming and administrative staff also have frequent, close interaction with inmates; the discipline and other restrictions those officials impose, and the services they provide—including intake and assignment to living quarters, provision of health care, and supervision of educational and work activities—have an important impact on inmates' conditions of confinement. Prison administrators, regional staff, and Central Office

[1] Claims are also made in this case against respondent Loye W. Miller, Jr., former Director of Public Affairs at the Department of Justice, who was not a BOP official.

staff make policy and management decisions that affect local staff action, and, in turn, the inmates themselves. Administrators also make appeal decisions in disciplinary cases and other administrative claims. See generally 28 C.F.R. 542.10-542.16.

The contact of all levels of BOP staff with inmates in the often adversarial environment of incarceration generates numerous allegations by inmates that actions were taken against them for unlawful reasons. Many of these allegations are unfounded. The comprehensive control exercised by prison staff over the inmate population also carries with it the risk that staff members may at times abuse their authority and violate inmates' constitutional rights. Careful accommodation is required between preserving the right to redress for constitutional violations, when such violations occur, and limiting the impact of meritless inmate claims that may be costly to litigate, that may impose severe burdens on institutional management, and that may also impose substantial litigation burdens on individual defendants.

2. The district court's decision in this case was rendered in response to respondents' motion for summary judgment. That court was therefore required, as was the court of appeals, to view the evidence in the light most favorable to petitioner. Except where indicated, the following summary of the facts is taken from the court of appeals' opinion (Pet. App. 3a-7a).

The events giving rise to this case began shortly before the November, 1988, presidential election. Petitioner was incarcerated at the El Reno Federal Correctional Institution (El Reno) in El Reno, Oklahoma, serving a 51-year sentence for drug and explosives violations. He was placed in administrative detention on three different occasions before and after the election.

He alleges that those placements were either intended to deny him access to the press or were in retaliation for his exercise of free speech rights. Respondents, on the other hand, maintain that the detentions were motivated by lawful official purposes—to ensure petitioner's safety and in response to charges that petitioner had violated prison rules regarding "third party" telephone calls. Pet. App. 7a.

More than a week before the election, petitioner spoke by telephone with journalist Nina Totenberg and claimed that he had sold marijuana to Dan Quayle, the Republican candidate for Vice President, when Quayle was a law student in the early 1970s. Totenberg arranged for petitioner to make an affidavit recounting his version of events, which she showed to high-level members of the Bush/Quayle campaign. Totenberg did not broadcast the story, however, because she could not corroborate it. Pet. App. 3a, 21a-22a; C.A. App. 79.

Other news organizations heard of petitioner's allegations. On November 3, the Thursday before the election, NBC News contacted El Reno officials and requested an in-person interview with petitioner. El Reno officials offered to arrange an interview on November 8, election day, but NBC responded that that would be too late, and threatened to run a "cover-up" story if an earlier interview were not arranged. On Thursday, November 3, the Bureau's Central Office instructed El Reno officials to arrange for an earlier interview, and NBC taped an interview with petitioner on Friday, November 4.[2] NBC

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[2] In a July 13, 1990, letter to Time Magazine, C.A. App. 92, and in an August 31, 1990, letter to Congressman Robert W. Kastenmeier, C.A. App. 107, respondent J. Michael Quinlan, then-Director of the BOP, stated that he concurred in and facilitated the BOP's decision to arrange for the earlier interview.

ultimately decided not to broadcast the story. Pet. App. 3a, 22a; C.A. App. 12-13, 94.

After the NBC interview, other media organizations sought to interview petitioner. El Reno's Acting Warden suggested that a group interview be set up to make it less burdensome on the institution to handle the volume of inquiries. The Executive Assistant to the El Reno Warden told petitioner on November 4 that he would set up a "press conference" for that evening at 7:00 p.m. Pet. App. 4a, 22a.

On either November 3 or November 4, Bush/Quayle campaign officials learned of petitioner's allegations and a campaign official telephoned the Bureau "for additional information" and learned of the November 4 NBC interview. Pet. App. 3a; C.A. App. 96. The campaign Press Secretary spoke with respondent Loye Miller, the then-Director of Public Affairs at the Department of Justice, and said he was "amazed" that petitioner was to hold a press conference. Miller responded, "Well, amazed or not, he's going to have one. It's within his rights to have one according to the rules and regulations." Pet. App. 4a, 26a-27a. However, respondent J. Michael Quinlan, then-Director of the BOP, instructed the El Reno authorities to cancel the press conference because he believed "the Bureau's policy on media access permits individual media contacts by inmates, as well as small press pools under specialized circumstances, but does not authorize inmate press conferences." *Id.* at 4a; C.A. App. 95; see 28 C.F.R. 540.60-540.65. Quinlan stated that he had not allowed an inmate press conference during his tenure as BOP Director. Pet. App. 4a.

a. *November 4 Detention.* At approximately 11:30 p.m. on November 4, petitioner was placed in administrative detention at Quinlan's direction, pending investigation of allegations that petitioner had told a news

reporter that petitioner was in danger. Pet. App. 5a; C.A. App. 67. The administrative detention order by El Reno officials recited that petitioner had "stated to the National news media this [sic] his life is in danger and so is being placed in Administrative Detention for his protection." Pet. App. 5a, 24a; C.A. App. 48. Petitioner contends that he was expressly prohibited from making telephone calls until the afternoon of November 5. Pet. 6; Pet. App. 24a; C.A. App. 74.[3] While petitioner was in detention, the Bush/Quayle campaign Press Secretary again called Miller and "noted the obvious: that the closer to the Tuesday election that the story were to break, the more attention it was likely to get, and the better the chance that it could have at least some adverse effect on the Bush-Quayle chances." Pet. App. 5a-6a; C.A. App. 85. According to Miller, however, the Press Secretary "did not try in any way to influence the department's handling of Kimberlin." Pet. App. 6a; C.A. App. 85. Petitioner was released from administrative detention at 7:30 p.m. on Saturday, November 5. Pet. App. 6a, 23a.

b. *November 7 Detention.* After he was released from administrative detention on November 5, petitioner made several telephone calls in order to schedule a group telephone interview with reporters, who planned to gather for that purpose at the Mayflower Hotel in Washington, D.C., on the morning of Monday, November 7. Pet. App. 23a. At approximately 9:00 a.m. on

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[3] In responses to requests for admissions filed in 1993, after the issuance of the district court order denying respondents' motion to dismiss or for summary judgment, petitioner admitted that he was briefly removed from his detention cell on the afternoon of November 5 in order to telephone Nina Totenberg. Plaintiff's Responses to Defendants' Request For Admissions, Question 1 (Feb. 16, 1993).

November 7, before the group telephone interview took place, petitioner was again placed in administrative detention, where he remained for seven days. C.A. App. 75. Petitioner contends that he was not authorized to make telephone calls during that time, except to his lawyer. *Ibid.*[4] The reason given for that detention was violation of a prison regulation prohibiting inmates from making third-party telephone calls, *i.e.*, calls made to one party, and then electronically transferred by that party to a third party. Pet. App. 6a (citing 28 C.F.R. 540.104). On November 14, after an administrative hearing at which petitioner was found guilty of violating the telephone regulation, he was released from administrative detention. Pet. App. 6a, 25a-26a.

c. *December 22 Detention.* Petitioner was again placed in administrative detention on December 22, the day after he held two telephone interviews, and a few days after news stories appeared recounting his conflicts with prison officials. The reason given was violation of the prohibition on third-party telephone calls. Petitioner was released from detention on December 23, and was found not guilty of the violation because there was "no specific evidence that [he] intentionally placed a conference/third-party call." Pet. App. 6a-7a.

3. On August 15, 1990, petitioner filed suit including, *inter alia*, a *Bivens* claim that respondents had placed him in detention in violation of his First Amendment

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[4] Although petitioner contends that he was denied comunication with the news media, his subsequent responses to requests for admissions reflect that, "at some point during his detention, prison officials briefly removed [petitioner] from his cell and brought him to the office of [the Executive Assistant to the El Reno Warden], where he was interviewed on camera" by a member of the news media. Plaintiff's Responses to Defendants' Request For Admissions, Question 17 (Feb. 16, 1993).

rights.[5] Respondents promptly moved to dismiss or for summary judgment on grounds of qualified immunity. The district court stayed discovery relating to the *Bivens* claims pending resolution of the qualified-immunity question. Pet. App. 2a; see C.A. App. 3 (referring to order dated 11/26/90).[6]

On August 6, 1991, the district court held that respondents were not entitled to qualified immunity. Pet. App. 44a-62a. "[I]f [respondents] were motivated by a purpose to keep [petitioner] from speaking to the press because of the content of his expected communications, their conduct violated a well-established right, and qualified immunity would not attach[] to their actions." *Id.* at 48a. The court held that a heightened pleading standard applied to *Bivens* claims based on unconstitutional motive, requiring "allegations that are tangible and nonconclusory, even if these allegations would properly be regarded as circumstantial (as distinguished from direct or testimonial)." *Id.* at 52a. Petitioner, in the court's view, met that standard. *Id.* at 53a-56a. Reasoning that the decision of the District of Columbia Circuit in *Siegert* v. *Gilley*, 895 F.2d 797 (1990), aff'd on other grounds, 500 U.S. 226 (1991), was "susceptible of more than one interpretation," the district court did not apply *Siegert*'s "direct evidence" rule. Pet. App. 50a. It

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[5] Petitioner also brought a *Bivens* claim of violation of his Fifth Amendment due process rights, and claims against the United States and respondent Quinlan, in his official capacity as BOP Director, under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2511. Only the First Amendment *Bivens* claims are involved in the petition.

[6] Discovery relating to the non-*Bivens* claims was not, however, stayed, and discovery that petitioner obtained relating to his other claims also proved relevant to his *Bivens* claims.

held that *Siegert* should not be read to require a *Bivens* plaintiff to plead direct evidence, because "circumstantial evidence is intrinsically no different than direct evidence." *Id.* at 52a. Because of its denial of qualified immunity, the court lifted the discovery stay. *Id.* at 63a.

4. Respondents took an interlocutory appeal, and the court of appeals reversed. Pet. App. 1a-43a. In a divided decision, the court held that an elevated standard of pleading and proof applies where a plaintiff "sues government officials and alleges unconstitutional motive." *Id.* at 8a. That standard requires "pleading of specific *direct* evidence of intent to defeat a motion to dismiss and subsequent production of such evidence to defeat a motion for summary judgment." *Id.* at 9a.[7] Petitioner failed to meet that standard because he did not proffer "*direct* evidence of unconstitutional motive on the part of the two defendants and was precluded from relying on mere circumstantial evidence." *Id.* at 12a-13a. Petitioner "relie[d] only on inference and weak circumstantial evidence, notably the timing of events, to support his claim of unconstitutional detention by [respondents]." *Id.* at 17a.[8]

Judge Williams, concurring, stated that the court's decision was mandated by circuit precedent, but added that "[t]his is not to say that circuit law is correct."

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[7] The court noted that, although other circuits had "refrain[ed] from adopting the direct/circumstantial distinction," most circuits had adopted some form of heightened pleading standard. Pet. App. 9a-10a.

[8] The court noted that, "as [applied] here, at the summary judgment stage, the expression 'heightened pleading' is a misnomer because the enhanced standard requires a greater evidentiary showing rather than enhanced pleading." Pet. App. 9a n.8 (citing *Elliott* v. *Thomas*, 937 F.2d 338, 345 (7th Cir. 1991), cert. denied, 112 S. Ct. 973, 1242 (1992)).

Pet. App. 17a. He described the direct evidence rule as an effort to effectuate the purpose of qualified immunity to create "an especially high threshold" before government officials are exposed to burdensome discovery regarding their motivation. *Id.* at 17a-18a. He observed, however, that "[t]he distinction between direct and circumstantial evidence * * * appears completely arbitrary and unrelated to the strength of the plaintiff's case," and found it "hardly surprising that the only circuits to consider our direct evidence rule have rejected it." *Id.* at 18a (citing *Elliott* v. *Thomas*, 937 F.2d 338, 344-345 (7th Cir. 1991), cert. denied, 112 S. Ct. 973, 1242 (1992); *Branch* v. *Tunnell*, 937 F.2d 1382, 1386-1387 (9th Cir. 1991)). He concluded that "[i]f the direct evidence rule is reexamined *en banc*, * * * the reconsideration should encompass alternatives." *Id.* at 19a.

Judge Edwards dissented. Pet. App. 19a-43a. In his view, "a 'direct evidence rule' finds no support in the Federal Rules, is at odds with Supreme Court precedent, defies the case law of this and other circuits, and is a nonsensical notion." *Id.* at 30a.

5. The court of appeals denied petitioner's suggestion for rehearing en banc. Pet. App. 64a-75a. In a statement concurring in the denial of rehearing en banc, Judge Williams, joined by Judges Silberman and Buckley, stated that "[t]he imperfections of our 'direct evidence' rule are plain to see," *id.* at 65a, but concluded that "it seems to me on balance preferable to continue with the imperfections of [the District of Columbia Circuit's holding in] *Siegert* until the Supreme Court resolves the issue," *id.* at 66a-67a. Judge Silberman also wrote a statement concurring in the denial of rehearing en banc, in which he recognized that "[t]hose who criticize this circuit's direct versus circumstantial evidence

distinction * * * have a logical point," but concluded that "the Supreme Court is better positioned than we to resolve the broader problem." *Id.* at 67a. Judge Edwards, joined by Chief Judge Mikva and Judge Wald, dissented from the denial of rehearing en banc. He concluded that "[t]his court is bound by Supreme Court precedent, by fidelity to our own precedents, and by simple logic, both to rehear and revise *Kimberlin* v. *Quinlan*. It is my hope that the Supreme Court will see fit to reverse the error that this decision introduces into the law of this circuit." *Id.* at 74a-75a.

DISCUSSION

1. Certiorari should be granted, limited to the second question presented, regarding the District of Columbia Circuit's "direct evidence" rule. The District of Columbia Circuit generally requires "heightened pleading" in *Bivens* cases. Under that standard, a plaintiff must—after a qualified-immunity defense is raised—allege a constitutional violation with sufficient detail to permit the district court to determine whether the claims should proceed to discovery. See *Kartseva* v. *Department of State*, 37 F.3d 1524, 1531 (D.C. Cir. 1994). The Circuit's direct evidence rule constitutes an additional requirement in *Bivens* cases in which motive is an element of the constitutional claim. The rule requires that plaintiffs in such cases plead and present direct as opposed to circumstantial evidence of the alleged unconstitutional motive.[9]

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[9] The direct evidence rule, like the heightened pleading standards that courts of appeals apply to motive-based claims, see pp. 15-16, *infra*, was a judicial response to this Court's decision in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). *Harlow* held that the test for determining the availability of qualified immunity is an objective one, turning not on the official's subjective "good faith," but on whether the right asserted was clearly established. *Id.* at

The decision in this case imposing the requirement of direct evidence conflicts with decisions of the four other circuits to have considered whether plaintiffs in *Bivens* cases in which motive is an essential element of the constitutional claim must plead or prove such motive on the basis of non-circumstantial evidence. Those circuits have expressly rejected the District of Columbia Circuit's direct evidence rule. See *Tompkins* v. *Vickers*, 26 F.3d 603, 608-609 (5th Cir. 1994); *Branch* v. *Tunnell* (*Branch I*), 937 F.2d 1382, 1386-1387 (9th Cir. 1991); *Elliott* v. *Thomas*, 937 F.2d 338, 345 (7th Cir. 1991), cert. denied, 112 S. Ct. 973, 1242 (1992); *Crutcher* v. *Kentucky*,

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818. That decision recognized that, so long as determination of the official's state of mind was an element of the immunity defense, application of immunity would require "[j]udicial inquiry into subjective motivation," *id.* at 817, thus often imposing discovery burdens on officials. Neither *Harlow* nor this Court's other immunity decisions resolved the issue of how to treat cases in which a plaintiff's allegation of improper motive or malice is an element of the claimed constitutional violation and a qualified-immunity defense is raised. Some courts of appeals have reasoned that, just as the pre-*Harlow* "good faith" standard potentially conflicted with the purpose of immunity to avoid litigation burdens, allowing discovery into an official's motive in cases where that motive is an element of the constitutional claim might impose "precisely the burden *Harlow* sought to prevent." *Hobson* v. *Wilson*, 737 F.2d 1, 29 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985); see *Branch* v. *Tunnell*, 937 F.2d 1382, 1386 (9th Cir. 1991); *Elliott* v. *Thomas*, 937 F.2d 338, 344-345 (7th Cir. 1991), cert. denied, 112 S. Ct. 973, 1242 (1992); see also *Siegert* v. *Gilley*, 500 U.S. 226, 235-236 (1991) (Kennedy, J., concurring in the judgment) ("There is a tension between the rationale of *Harlow* and the requirement of malice, and it seems to me that the heightened pleading requirement is the most workable means to resolve it."). The District of Columbia Circuit's direct evidence rule was a response to that concern. See *Siegert* v. *Gilley*, 895 F.2d 797, 801-802 (D.C. Cir. 1990), aff'd on other grounds, 500 U.S. 226 (1991).

883 F.2d 502, 504 (6th Cir. 1989). In *Elliott*, the Seventh Circuit stated:

> Although the [District of Columbia Circuit's] opinion in *Siegert* insisted that the plaintiff produce "direct" evidence of the defendant's improper intent, we agree with Justice Kennedy['s] [opinion concurring in the judgment in *Siegert*] that there is no principled difference between direct and circumstantial evidence. Requiring "direct" evidence of intent would be fatal in all but the rare case in which the defendant confessed.

937 F.2d at 345 (citations omitted). The Ninth Circuit similarly concluded in *Branch I*:

> We disagree * * * with the District of Columbia Circuit that a plaintiff may only satisfy the heightened pleading standard with direct, as opposed to circumstantial evidence. * * * Because evidence of intent is largely within the control of the defendant and often can be obtained only through discovery, we are unwilling to require a plaintiff to present direct evidence of that intent in order to avert dismissal.

937 F.2d at 1386-1387. See also *Tompkins*, 26 F.3d at 609 ("We agree with those Circuits that have rejected the argument that a plaintiff must produce direct evidence in a case such as this. Circumstantial evidence is equally as probative as direct evidence in proving illegitimate intent.").[10] The District of Columbia Circuit alone

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[10] Although the Sixth Circuit in *Poe* v. *Haydon*, 853 F.2d 418, 432 (1988), cert. denied, 488 U.S. 1007 (1989), stated that "the plaintiff must present direct evidence that the officials' actions were improperly motivated" in order to defeat a motion asserting qualified immunity, that court subsequently construed *Poe* to allow

requires that a plaintiff plead and present direct as opposed to circumstantial evidence in these cases.

We believe that the requirement of direct (as opposed to circumstantial) evidence in this context is incorrect, and warrants this Court's review. As Justice Kennedy recognized in his opinion concurring in the judgment in *Siegert* v. *Gilley*, 500 U.S. 226, 235-236 (1991), the District of Columbia Circuit's direct evidence rule appears to conflict with this Court's decision in *Holland* v. *United States*, 348 U.S. 121 (1954).[11] *Holland* held that "[c]ircumstantial evidence * * * is intrinsically no different from testimonial evidence." *Id.* at 140.[12] That principle is well established in the law governing proof of purpose or intent.[13] An opposing party's state of mind is,

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a plaintiff to rely on "inferential and circumstantial proof" alone. *Crutcher*, 883 F.2d at 504.

[11] See also *Siegert*, 500 U.S. at 246 (Marshall, J., dissenting) ("the Court of Appeals erred in holding that a district court may not permit limited discovery in a case involving unconstitutional motive unless the plaintiff proffers *direct* evidence of the unconstitutional motive").

[12] The *Holland* Court stated that, "[a]dmittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference." 348 U.S. at 140. See also *Wyatt* v. *Cole*, 112 S. Ct. 1827, 1837 (1992) (Kennedy, J., concurring) (the question of intent "is a factual one, and a plaintiff may rely on circumstantial rather than direct evidence to make his case").

[13] See, *e.g.*, *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977) ("[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available," and direct evidence is not required); *United States Postal Service Bd. of Governors* v. *Aikens*, 460 U.S. 711, 714 n.3 (1983) ("As in any lawsuit, the

by its nature, difficult to prove, and is most often proved by circumstantial evidence. In his brief in *Siegert* v. *Gilley*, the Solicitor General thus took the position that the decision of the court of appeals in that case should not be read to require direct evidence, because such a requirement would conflict with *Holland*. Brief for the Respondent at 20 n.13 (No. 90-96). We continue to adhere to the view that the direct evidence rule is incorrect.

Three of the judges on the District of Columbia Circuit who supported the decision below also questioned the validity of the direct evidence requirement. Judge Williams, concurring in the panel decision, adhered to the direct evidence rule as the law of the circuit, but stated that "[t]he distinction between direct and circumstantial evidence * * * appears completely arbitrary and unrelated to the strength of the plaintiff's case." Pet. App. 18a. Judges Silberman and Buckley joined Judge Williams in his statement supporting the denial of rehearing en banc, in which he reiterated that "[t]he imperfections of our 'direct evidence' rule are plain to see." *Id.* at 65a; see also *id.* at 67a (Silberman, J., concurring) ("Those who criticize this circuit's direct versus circumstantial evidence distinction * * * have a logical point."). Each of the three opinions concurring in or dissenting from the denial of rehearing en banc called on this Court to review the issue. *Id.* at 66a-67a, 67a, 74a-75a.

2. The issue with regard to the first question presented by the petition for certiorari is whether a plaintiff asserting a *Bivens* claim of which motive is an element must make allegations with heightened specificity at the pleading stage. Several courts of

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plaintiff may prove his case by direct or circumstantial evidence. * * * [T]he District Court should not have required [the plaintiff] to submit direct evidence of discriminatory intent.").

appeals, including the District of Columbia Circuit, have held that, in cases in which the defense of qualified immunity is raised, more than bare, conclusory allegations of unconstitutional motive are required. See, *e.g.*, *Branch* v. *Tunnell* (*Branch II*), 14 F.3d 449, 452 (9th Cir.) ("[I]n order to survive a motion to dismiss, plaintiffs must state in their complaint nonconclusory allegations setting forth evidence of unlawful intent. The allegations of facts must be specific and concrete enough to enable the defendants to prepare a response, and where appropriate, a motion for summary judgment based on qualified immunity."), cert. denied, 114 S. Ct. 2704 (1994); *Elliott*, 937 F.2d at 344-345 (requiring the plaintiff "to produce 'specific, nonconclusory factual allegations which establish [the necessary mental state], or face dismissal'").[14] There appears to be no circuit conflict on the issue of whether heightened pleading of motive-based claims is required once an immunity defense has been raised. In addition, the issue of whether the pleading in this case was sufficiently specific to satisfy that test was not addressed by the court below and is not raised by the facts of this case.

a. In *Leatherman* v. *Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160 (1993), this Court unanimously rejected a judicially fashioned requirement of heightened pleading of civil rights claims generally. Because Federal Rule of Civil Procedure 9(b) imposes a requirement of pleading with heightened particularity only in two specified contexts—claims of fraud or mistake—and does not similarly impose such a

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[14] The District of Columbia Circuit has not limited the heightened pleading standard (as opposed to the direct evidence rule) to "claims in which the outcome depends on the defendant's state of mind," but held that it "applies to all *Bivens* or [42 U.S.C.] 1983 claims." *Kartseva*, 37 F.3d at 1531.

requirement on claims of municipal liability under 42 U.S.C. 1983, *Leatherman* held that Section 1983 claims are governed by the Rule 8(a)(2) regime of "notice pleading." 113 S. Ct. at 1163. *Leatherman* expressly reserved the question whether the same logic would apply to claims to which qualified immunity may be a defense. *Id.* at 1162 (because municipalities enjoy no immunity from suit, "[w]e * * * have no occasion to consider whether our qualified immunity jurisprudence would require a heightened pleading in cases involving government officials").

Several courts since *Leatherman* have relied on this Court's reservation of the issue and have continued to adhere to standards of heightened pleading in the qualified-immunity context. See, *e.g.*, *Babb* v. *Dorman*, 33 F.3d 472, 477 (5th Cir. 1994) (continuing, in light of *Leatherman*, to require that complaint "state with factual detail and particularity the basis for the claim which necessarily includes why the defendant-official cannot successfully maintain the defense of [qualified] immunity"); *Schultea* v. *Wood*, 27 F.3d 1112, 1115 n.2 (1994) (same), reh'g en banc granted, No. 93-2186 (5th Cir.); *Branch II*, 14 F.3d at 452, 455-457 (adhering after *Leatherman* to requirement set forth in *Branch I* that the "complaint contain nonconclusory allegations" of defendant's scienter); Pet. App. 9a n.9.[15] The cases that petitioner contends rely on *Leatherman* to reject

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[15] See also *Jordan by Jordan* v. *Jackson*, 15 F.3d 333, 339 n.5 (4th Cir. 1994) (distinguishing in dictum the pleading question in qualified-immunity cases from the claim of municipal liability there at issue); cf. *Elliott* v. *Perez*, 751 F.2d 1472, 1483 (5th Cir. 1985) (Higginbotham, J., concurring specially) (stating, in light of the limited scope of Rule 9(b), that "I do not know where we find the authority to add the requirement that claims against officials who enjoy immunity from suit shall be pled with particularity").

heightened pleading in the qualified-immunity context (Pet. 16-17) do not, in fact, conflict with these holdings; those cases, although they dealt with claims against individual officials, did not explicitly address the effect of a qualified-immunity defense. See, *e.g.*, *Black* v. *Lane*, 22 F.3d 1395 (7th Cir. 1994); *Oropallo* v. *Parrish*, 1994 WL 168519 (1st Cir. May 5, 1994).[16] In view of the absence of a circuit conflict on this issue, we believe that there is no need for the Court to address it at this time.

b. Furthermore, even if there were a conflict, this case is not an appropriate vehicle for reviewing whether a plaintiff raising motive-based constitutional claims to which qualified immunity may be a defense is required to plead his or her claims with greater specificity than would otherwise be required. The complaint and other pleadings in this case are not conclusory, but instead contain detailed and specific allegations. The issue raised and decided below did not concern the specificity of petitioner's allegations, but whether petitioner should be required to plead and present direct as opposed to circumstantial evidence. The District of Columbia Circuit held that a plaintiff raising a motive-based *Bivens* claim must produce direct evidence of improper motive to proceed with discovery on that claim. Pet. App. 17a. That ruling neither raises nor resolves the question whether, apart from a direct evidence requirement, a complaint must be pled with heightened specificity where qualified immunity may be a defense. In addition,

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[16] Petitioner also cites several district court cases as extending *Leatherman* (Pet. 17 n.13), some of which simply did not address qualified immunity, and none of which have been accepted by any courts of appeals. See, *e.g.*, *Sapp* v. *Cunningham*, 847 F. Supp. 893, 900 n.9 (D. Wyo. 1994) (holding that *Leatherman* overruled the Tenth Circuit's heightened pleading standard even for individual-capacity claims subject to qualified-immunity defense).

the fact that petitioner obtained documents during a period when discovery on the *Bivens* claims was stayed (but discovery on non-*Bivens* claims was going forward) puts this case in a highly unusual posture. The issue in the typical *Bivens* case at the same procedural stage is whether discovery should go forward or whether the case should be dismissed before discovery. The court of appeals' decision in this case, however, did not completely preclude petitioner from conducting discovery.

CONCLUSION

The petition for a writ of certiorari should be granted limited to Question 2 in the petition for a writ of certiorari.

Respectfully submitted.

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